

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

GULF COOPERATION COUNCIL,) ICDR CASE NO. 01-14-0002-1065
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

**ICANN'S RESPONSE TO GULF COOPERATION COUNCIL'S
REQUEST FOR INDEPENDENT REVIEW PROCESS**

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Response to the Request for Independent Review Process (“IRP Request”) submitted by claimant Gulf Cooperation Council (the “GCC”) on 5 December 2014.

1. The GCC argues that it objects to the application for the .PERSIANGULF generic top level domain (“gTLD”) submitted by Asia Green IT System Ltd. (“Asia Green”) because the “Arab nations that border the Gulf prefer the name ‘Arabian Gulf.’”¹ The GCC, and certain of its member States, first voiced concerns over the potential gTLD in 2012. Since then, in December 2012, ICANN’s Independent Objector (“IO”) reviewed GCC’s concerns and found that he had no basis to object to Asia Green’s .PERSIANGULF application (the “Application”). Thereafter, in July 2013, the Governmental Advisory Committee (“GAC”), a body that provides advice to ICANN on behalf of governments, informed ICANN that it “d[id] not object” to the .PERSIANGULF Application proceeding. Following that, on 30 October 2013, an independent expert appointed by the ICC² determined that the GCC’s formal Community Objection to the Application did not prevail. Then, rather than timely pursuing ICANN’s well-documented accountability mechanisms to challenge ICANN’s processing of the Application, the GCC waited for over one year to file this IRP Request.

2. There is no question that the GCC believes strongly in its position in this naming dispute. There are, however, significant questions about the timeliness and merits of the GCC’s IRP Request. First, the GCC filed its IRP Request *over a year too late*. It is therefore time barred pursuant to ICANN’s Bylaws. To now permit the GCC to proceed with its IRP not only violates ICANN’s documented procedures, but it also prejudices ICANN and others, such as

¹ IRP Request, ¶ 3.

² The International Chamber of Commerce

Asia Green, who have rightfully relied on the absence of any IRP claims in continuing to process and invest in the Application. Second, even if the GCC's IRP Request were timely, the GCC has not identified any ICANN Board action or decision that was inconsistent with ICANN's Articles of Incorporation ("Articles") or Bylaws, which is the only question at issue in IRP proceedings such as this. To the contrary, the record demonstrates that the actions of ICANN's Board with respect to the .PERSIANGULF Application were in all respects consistent with the processes set out in the Bylaws and in the New gTLD Applicant Guidebook ("Guidebook"). Third, the GCC has not been negatively and "materially affected" by the ICANN Board's decision to proceed with the .PERSIANGULF Application, as is required to properly assert an IRP, because the GCC has not identified any legally-recognized injury that it will suffer if the Application proceeds.

BACKGROUND FACTS

I. ICANN

3. ICANN was formed in 1998. It is a California not-for-profit public benefit corporation. ICANN's mission "is to coordinate, at the overall level, the global Internet's system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems," including the domain name system ("DNS").³

4. ICANN is a complex organization that facilitates input from stakeholders around the globe. ICANN has an international Board of Directors, over 300 staff members, and an Ombudsman. ICANN is much more than just a corporation—it is a community of participants. In addition to the Board, the staff, and the Ombudsman,⁴ the ICANN community includes a Nominating Committee,⁵ three Supporting Organizations,⁶ four Advisory Committees,⁷ a group

³ ICANN Bylaws ("Bylaws"), Art. I, § 1 (Ex. R-1).

⁴ *Id.*, Art. V.

⁵ *Id.*, Art. VII.

of technical expert advisors,⁸ and a large, globally distributed group of community members who participate in ICANN's processes.

5. One of ICANN's Advisory Committees is the Governmental Advisory Committee ("GAC"), which is a body consisting of members appointed by and representing governments. The GAC was created to "consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements, or where they may affect public policy issues."⁹ Membership in the GAC is open to all national governments and distinct economies as recognized in international fora. The importance of the GAC's advice to ICANN is built into ICANN's Bylaws:

The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.¹⁰

II. THE NEW GTLD PROGRAM

6. In its early years, and in accordance with its Core Values, ICANN focused on increasing the number of companies that could sell domain name registrations to consumers ("registrars"). ICANN also focused on expanding, although more slowly, the number of companies that operate gTLDs ("registries"). In 2000, ICANN approved seven gTLDs in a

(continued...)

⁶ *Id.*, Arts. VIII-X.

⁷ *Id.*, Art. XI.

⁸ *Id.*, Art. XI-A, § 2.

⁹ *Id.*, Art. XI, § 2.1.

¹⁰ *Id.*, Art. XI, § 2.1.j.

“proof of concept” phase that was designed to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet. In 2004 and 2005, ICANN approved a handful of additional TLDs.

7. The New gTLD Program (“Program”) constitutes ICANN’s most ambitious expansion of the Internet’s naming system, by far. The Program’s goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII gTLDs and new non-ASCII, internationalized domain name (“IDN”) gTLDs.¹¹ In developing the Program with the ICANN community, numerous versions of the Guidebook were prepared and distributed throughout the ICANN community. Ultimately, ICANN went forward with the Program based on the version of the Guidebook published on 4 June 2012, which provides detailed instructions to gTLD applicants and sets forth the procedures for ICANN’s evaluation of new gTLD applications.

A. GAC Advice On New gTLDs

8. Pursuant to the Guidebook, all applications for new gTLDs are made available for review and public comment.¹² Concurrent with the public comment period, the GAC is able to issue “Early Warning” notices concerning particular applications.¹³ An Early Warning notice is not an official GAC statement against an application, but instead provides the applicant with an indication that one or more governments view the application as potentially sensitive or problematic.¹⁴ Applicants are advised that a GAC Early Warning should be taken seriously as it

¹¹ IDN gTLDs are gTLDs that include characters not within the US-ASCII (American Standard Code for Information Exchange) or Latin alphabets.

¹² New gTLD Applicant Guidebook (“Guidebook”), § 1.1.2.3 (Ex. R-2).

¹³ *Id.*, § 1.1.2.4.

¹⁴ *Id.*

raises the likelihood that the application could be the subject of GAC advice against it at a later stage in the process.¹⁵

9. The Guidebook also sets out a process whereby the GAC may issue advice to ICANN concerning any application for a new gTLD. As set forth in Section 3.1 of the Guidebook, GAC advice regarding a new gTLD application may take one of three forms. First, pursuant to Module 3.1, Part I of the Guidebook, the GAC may issue “consensus advice” as follows:

The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.¹⁶

10. Second, pursuant to Module 3.1, Part II of the Guidebook, the GAC may issue non-consensus advice indicating “that there are concerns about a particular application.”¹⁷ If the GAC issues non-consensus advice against an application, the ICANN Board is expected to enter into dialogue with the GAC to understand the scope of the concerns.¹⁸

11. Third, pursuant to Module 3.1, Part III of the Guidebook, the GAC may issue advice to ICANN “that an application should not proceed unless remediated.”¹⁹ This type of advice “will raise a strong presumption for the Board that the application should not proceed unless there is a remediation method available in the Guidebook (such as securing the approval of one or more governments), that is implemented by the applicant.”²⁰

12. With respect to gTLD applications, the GAC has generally provided its advice to

¹⁵ *Id.*

¹⁶ *Id.*, § 3.1(I).

¹⁷ *Id.*, § 3.1(II)

¹⁸ *Id.*

¹⁹ *Id.*, § 3.1(III).

²⁰ *Id.*

ICANN in the form of communiqués associated with one of ICANN’s Public Meetings, such as the “London Communiqué,” which is advice from the GAC borne out of the GAC’s meeting at the ICANN Public Meeting in London in June 2014.

13. The New gTLD Program Committee (“NGPC”) of the ICANN Board, which has the full authority of the Board with respect to the New gTLD Program and is comprised of all Board members that have no actual, potential, or perceived conflict of interest in pending new gTLD applications, is tasked with evaluating and responding to GAC advice on gTLD applications as well as communicating with the GAC regarding its advice.²¹ Throughout the Program, the NGPC has publicly issued “scorecards” relating to GAC advice, which are statements that track the GAC’s advice on certain issues and ICANN’s response to that advice.²²

B. The Independent Objector

14. Another aspect of the New gTLD Program is found in ICANN’s creation of an Independent Objector.²³ The IO is tasked with filing certain objections against “highly objectionable” gTLD applications to which no formal objection has been filed.²⁴ Pursuant to the Guidebook and ICANN’s practices and policies, “[n]either ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not to file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest.”²⁵

15. The IO’s standing to file a Community Objection is triggered when there is at

²¹ See Board Resolution 2012.04.10.02 (Ex. R-3), *also available at* <https://features.icann.org/2012-04-10-establishment-new-gtld-program-committee>. Accordingly, any advice to the ICANN Board is advice to the NGPC, and if Board action is required, action by the NGPC may be considered Board action for purposes of these proceedings.

²² See <http://newgtlds.icann.org/en/applicants/gac-advice>.

²³ Guidebook, § 3.2.5 (Ex. R-2).

²⁴ *Id.*

²⁵ *Id.*

least one comment in opposition to the application made in the public sphere.²⁶

C. The Objection And Dispute Resolution Process

16. In addition to the advice from the GAC and the existence of the IO, governments, as well as other entities and individuals, can formally object to a gTLD application through ICANN's Objection and Dispute Resolution Process.²⁷ The Guidebook enumerates several grounds on which an objection may be filed. As is relevant here, an established institution associated with a clearly delineated community may file a "Community Objection" claiming that there is "substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted."²⁸ All Community Objections are heard by independent, expert panels selected by the ICC.²⁹

17. In order to succeed on a Community Objection, an objector must establish the following: (i) the community invoked by the objector is a clearly delineated community; (ii) community opposition to the application is substantial; (iii) there is a strong association between the community invoked and the applied-for gTLD string; and (iv) the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.³⁰ The Guidebook makes clear that "[i]f opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail."³¹

²⁶ *Id.*

²⁷ Guidebook, §§ 3.2, 3.2.3. (Ex. R-2).

²⁸ *Id.*, § 3.2.1.

²⁹ *Id.*, § 3.2.2.

³⁰ *Id.*, § 3.5.4.

³¹ *Id.*

18. The Guidebook does not provide any procedure by which ICANN (or anyone else) is to conduct a substantive review of an expert panel’s determination on a Community Objection.³² Notably, the decision not to have an appellate mechanism for objection proceedings was a community-driven decision, which, among other things, was intended to help reduce the time and expense associated with the objection process and to ensure that those with the requisite expertise were making the ultimate determinations.

III. ICANN’S ACCOUNTABILITY MECHANISMS

19. ICANN has a proven commitment to accountability and transparency in all of its practices. ICANN considers these principles to be fundamental safeguards in ensuring that its bottom-up, multi-stakeholder model remains effective. The mechanisms through which ICANN achieves accountability and transparency are built into every level of its organization and mandate. In order to reinforce its transparency and accountability, ICANN has established specific accountability mechanisms for review of ICANN actions.³³

20. For instance, ICANN’s Bylaws permit an individual or entity that purportedly has been adversely and materially affected by an action or inaction of ICANN’s staff or Board to request that the Board reconsider that action or inaction (a “Reconsideration Request”).³⁴ Reconsideration Requests are reviewed and considered by ICANN’s Board Governance Committee (“BGC”). The BGC can make a final determination on the Reconsideration Request when the request involves staff conduct; when the Reconsideration Request involves Board conduct the BGC makes a recommendation to the Board for a final determination.

21. In addition to Reconsideration Requests, ICANN has also established the

³² *Id.*, § 3.4.6.

³³ *Id.*, Art. IV; *see also* ICANN Accountability Mechanisms Available to the ICANN Community (Ex. R-4), *also available at* <https://www.icann.org/sites/default/files/assets/accountability-mechanisms-5100x3300-19mar14-en.png>.

³⁴ Bylaws, Art. IV, § 2.2 (Ex. R-1).

separate IRP that may be invoked by parties that claim they were materially and adversely by a Board action alleged to be inconsistent with ICANN’s Articles or Bylaws.³⁵ As set forth in the Bylaws, prior to initiating a request for IRP, complainants are urged to enter into a cooperative engagement process (“CEP”) with ICANN “for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP.”³⁶ The CEP is invoked “by providing written notice to ICANN at [independentreview@icann.org], noting the invocation of the process, identifying the Board action(s) at issue, identifying the provisions of the ICANN Bylaws or Articles of Incorporation that are alleged to be violated, and designating a single point of contact for the resolution of the issue.”³⁷

22. Although ICANN’s Bylaws specifically state that a “request for independent review must be filed within *thirty days* of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation,”³⁸ the running of this thirty-day period is stayed, or tolled, while the parties are engaged in a CEP.³⁹ Likewise, according to ICANN’s documented procedures, a potential IRP claimant and ICANN may modify the timing of a CEP or IRP while engaged in the CEP, as long as that modification is memorialized in writing.⁴⁰

IV. THE EVALUATION OF THE .PERSIANGULF APPLICATION

23. On 8 July 2012, Asia Green submitted an application for the .PERSIANGULF

³⁵ *Id.*, Art. IV, § 3.

³⁶ *Id.*, Art. IV, § 3.14.

³⁷ “Cooperative Engagement Process – Request for Independent Review, Pg. 1 (Ex. R-5), *also available at* <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf> .

³⁸ *Id.*, Art. IV, § 3.3 (Ex. R-1).

³⁹ “Cooperative Engagement Process – Request for Independent Review, Pg. 2 (Ex. R-5), *also available at* <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf> .

⁴⁰ *Id.* at ¶ 6.

gTLD. Subsequently, the governments of the United Arab Emirates, Oman, Baharain and Qatar sent virtually identical letters to the GAC and ICANN invoking the GAC’s Early Warning system regarding the Application and requesting that the GAC issue advice regarding whether a .PERSIANGULF gTLD is appropriate.⁴¹

24. On 20 November 2012, as set forth in the Guidebook, these four countries caused the GAC to issue an Early Warning on the Application claiming that “[t]he applied for new gTLD is problematic and refers to a geographical place with [a] disputed name” and “[I]ack[s] [...] community involvement and support.”⁴²

25. As required by the Guidebook, ICANN informed Asia Green of the GAC Early Warning, and publicly posted the Early Warning on ICANN’s website. However, as is clear in the Guidebook, this Early Warning was “not a formal objection, nor [did] it lead to a process that can result in rejection of the application.”⁴³ Rather, the GAC Early Warning served as notice to Asia Green “that the application [was] seen as potentially sensitive or problematic by one or more governments.”⁴⁴

26. In December 2012, the IO, Professor Alain Pellet, expressed his view regarding the Application.⁴⁵ The IO reviewed the history of this naming dispute, noted public comments against and in favor of a .PERSIANGULF gTLD, and described several, recognized authorities that utilize the name Persian Gulf for the sea area located between the Arabian Peninsula and

⁴¹ Letters to ICANN from the Governments of the United Arab Emirates, Bahrain, Qatar, and Oman (Exs. R-6-9).

⁴² GAC Early Warning from Regarding the Application (Ex. R-10).

⁴³ Guidebook, § 1.1.2.4 (Ex. R-2).

⁴⁴ *Id.*

⁴⁵ The IO’s Comments on the .PERSIANGULF Application (Ex. R-11), *also available at* <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/persiangulf-general-comment/>.

the Islamic Republic of Iran.⁴⁶ Based upon this, the IO concluded that the Application was not contrary to generally accepted legal norms of morality and public order.⁴⁷ The IO also concluded that there was no basis for him to file a Community Objection because “it is most debatable” whether a .PERSIANGULF gTLD creates a likelihood of material detriment to members of the Arabian Gulf community.⁴⁸ Finally, the IO noted that the Arabian Gulf community could file its own objection to the application.⁴⁹

27. On 13 March 2013, the GCC filed a Community Objection to the Application.⁵⁰ The ICC appointed Stephen M. Schwebel, former President of the International Court of Justice, to serve as the Expert Panelist to hear the GCC’s Community Objection.⁵¹

28. While the GCC’s Community Objection was pending, the GAC met during ICANN’s Beijing, China meeting in April 2013, and reviewed a number of gTLD applications. In what is known as the “Beijing Communiqué,” the GAC issued several different types of advice on numerous gTLD applications.⁵² First, the GAC provided consensus advice to ICANN that two applications, for .AFRICA and .GCC, should not proceed,⁵³ which under Section 3.1 of the Guidebook creates “a strong presumption for the ICANN Board that the application[s] should not be approved.”⁵⁴ Second, the GAC provided non-consensus advice to ICANN that some GAC members have raised concerns about two applications for religious terms, .ISLAM and .HALAL, and “it is the view of these GAC members that these applications should not

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Expert Determination in ICC Case No. EXP/423/ICANN/40, ¶ 2 (Ex. R-12).

⁵¹ See *id.*, ¶ 5.

⁵² Beijing Communiqué, ¶ IV.1.a.i.i.1-2 (Ex. R-13).

⁵³ The two applications were DotConnect Africa’s application for .AFRICA and the GCCIX WILL’s application for .the GCC.

⁵⁴ Beijing Communiqué, ¶ IV.1.a.i.i (Ex. R-13).

proceed,” which under Section 3.1 of the Guidebook means that the “ICANN Board is expected to enter into dialogue with the GAC to understand the scope of the concerns.”⁵⁵ Third, the GAC advised ICANN that it wanted to give further consideration at its next meeting in Durban, South Africa to several gTLD applications, including the application for .PERSIANGULF, and requested that ICANN not proceed beyond initial evaluation of these applications until the further consideration was concluded.⁵⁶

29. As required by the Guidebook, in May and June 2013, the NGPC considered the GAC advice provided in the Beijing Communiqué. On 4 June 2013, the NGPC adopted a Scorecard reflecting its response to the GAC advice.⁵⁷ First, the NGPC accepted the GAC consensus advice that two applications for .AFRICA and .GCC should not proceed, noting that both “will not be approved,” pursuant to the Guidebook.⁵⁸ Second, the NGPC accepted the GAC non-consensus advice regarding the two religious terms, .ISLAM and .HALAL, stating that “the NGPC stands ready to enter into a dialogue with the GAC on this matter,” pursuant to the Guidebook.⁵⁹ Third, the NGPC accepted the GAC’s request for additional time to consider several other applications, including the .PERSIANGULF Application, clarifying that “ICANN will not proceed beyond initial evaluation of these identified strings” until the GAC has had additional time to provide advice on the applications.⁶⁰ The NGPC also noted that Community Objections had been filed regarding several of these applications, including

⁵⁵ *Id.*, ¶ IV.1.a.i.ii.

⁵⁶ *Id.*, ¶ IV.1.c.

⁵⁷ NGPC Resolution 2013.06.04.NG01 (Ex. R-14), *also available at* <https://features.icann.org/consideration-non-safeguard-advice-gac%E2%80%99s-beijing-communicu%C3%A9?language=fr>.

⁵⁸ Annex 1 to NGPC Resolution 2013.06.04.NG01 at GAC Register #1-2 (Ex. R-15), *also available at* <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-04jun13-en.pdf>.

⁵⁹ *Id.* at GAC Register #3.

⁶⁰ *Id.* at GAC Register #4.

the .PERSIANGULF Application.⁶¹

30. In July 2013, the United States Government issued a public statement to the GAC regarding gTLD applications with geographic implications, including .PERSIANGULF.⁶² In this statement, the U.S. Government urged all relevant parties and GAC members to attempt to resolve any concerns about these gTLDs.⁶³ In addition, the U.S. Government noted that “the current rules for the new gTLD program do not specifically prohibit or condition these strings,” but stated that it was “willing in Durban to abstain and remain neutral on” these applications, “thereby allowing the GAC to present consensus objections on these strings to the [ICANN] Board, if no other government objects.”⁶⁴

31. The GAC next met during the ICANN Public Meeting in Durban. In the Durban Communiqué, which was the official statement from the GAC to ICANN as a result of the Durban meeting, the GAC informed ICANN that it “finalized its consideration” of the Application and that the GAC “*does not object*” to the application proceeding.⁶⁵

32. Thereafter, ICANN’s NGPC met to consider the Durban Communiqué and again adopted an NGPC Scorecard reflecting the NGPC’s response to that advice.⁶⁶ In its Scorecard, which was publicly posted over a year ago, on 12 September 2013, the NGPC noted that the GAC “has finalized its consideration of the following string, and does not object to it

⁶¹ *Id.*

⁶² U.S. Statement on Geographic Names in Advance of ICANN Durban Meeting (Ex. R-16), *also available at* http://www.ntia.doc.gov/files/ntia/publications/usg_nextsteps_07052013_0.pdf.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Durban Communiqué, ¶ IV.1.3 (CI’s Annex 24). Citations to “CI’s Annexes” refer to annexes to the GCC’s IRP Request.

⁶⁶ NGPC Resolution 2013.09.10.NG03 (Ex. R-17), *also available at* <https://features.icann.org/gac-communicu%C3%A9-durban-scorecard?language=es>.

proceeding: .persiangulf.”⁶⁷ In addition, the NGPC stated that “ICANN will continue to process that application in accordance with the established procedures in the [Guidebook],” but noted that the GCC’s Community Objection to the Application remained pending.⁶⁸

33. On 30 October 2013, the Expert Panelist hearing the GCC’s Community Objection, Judge Schwebel, issued his determination.⁶⁹ Judge Schwebel found that the GCC had failed to establish that “the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.”⁷⁰ Judge Schwebel determined—as the IO had suggested almost a year earlier—that the GCC’s claim that the existence of a .PERSIANGULF string would allow Asia Green to interfere with the core activities of the Arabian gulf community “d[id] not provide or constitute proof that the Application if granted will create a likelihood of material detriment to the community of the Objector.”⁷¹ Judge Schwebel continued: “Nor is it easy to see what material detriment is likely to occur, which may explain why the Objection is so terse in this regard. In the perception of the Expert, the fact remains that the practical effect of registration of .PERSIANGULF gTLD is difficult to discern and weigh. Hence it follows that a likelihood of material detriment has not been established.”⁷²

34. Finally, Judge Schwebel noted that:

The dispute between Arab States and supporters, on the one hand, and the Islamic Republic of Iran, on other hand, over the denomination of the Gulf, has subsisted for more than fifty years. It is far from clear that registration of .PERSIANGULF gTLD would resolve, or exacerbate, or

⁶⁷ Annex 1 to NGPC Resolution 2013.09.10.NG03 at GAC Register #9 (Ex. R-18), *also available at* <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-10sep13-en.pdf>.

⁶⁸ *Id.*

⁶⁹ Expert Determination in ICC Case No. EXP/423/ICANN/40 (Ex. R-12).

⁷⁰ *Id.*, ¶¶ 38, 40.

⁷¹ *Id.*, ¶ 40.

⁷² *Id.*

significantly affect, that dispute. In any event, the GCC and other Arab interests are and would remain free to seek registration of a domain such as .ARABIANGULF gTLD.⁷³

35. The GCC did not file a Reconsideration Request, did not institute a CEP, and did not pursue any other ICANN accountability process with respect the NGPC's statement that the .PERSIANGULF Application would proceed. Instead, the GCC waited for *over one year* after the NGPC's decision, until 5 December 2014, to file this IRP. On the same date, the GCC filed a Request for Emergency Relief ("Emergency Request"), seeking to stay finalization of a registry agreement between ICANN and Asia Green while the GCC's IRP is pending. ICANN and the GCC have fully briefed the Emergency Request, but the Emergency Request panelist selected by the ICDR has not yet issued his interim declaration.

STANDARD OF REVIEW

36. The IRP is a unique, non-binding process available under ICANN's Bylaws for persons or entities that claim to have been materially and adversely affected by a decision or action of the ICANN Board, but only to the extent that Board action was inconsistent with ICANN's Articles or Bylaws.⁷⁴ The IRP Panel, when it is constituted, will be tasked with providing its opinion as to whether the challenged Board actions violated ICANN's Articles or Bylaws.⁷⁵ ICANN's Bylaws specifically identify the deferential standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, focusing on:

- a. Did the Board act without conflict of interest in taking its decision?;
- b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. Did the Board members exercise independent judgment in taking the decision,

⁷³ *Id.*, ¶ 42.

⁷⁴ Bylaws, Art. IV, §§ 3.1, 3.2 (Ex. R-1).

⁷⁵ *Id.* Art. IV, § 3.4.

believed to be in the best interests of the company?⁷⁶

The IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.⁷⁷

37. ICANN has appointed the ICDR as ICANN’s IRP Provider. ICANN’s Bylaws and the Supplementary Procedures that the ICDR has adopted specifically for ICANN IRP proceedings apply here.⁷⁸ The Bylaws provide that the IRP be conducted via “email and otherwise via the Internet to the maximum extent feasible.”⁷⁹ The IRP Panel may also hold meetings via telephone where necessary, and “[i]n the unlikely event that a telephone or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.”⁸⁰

38. Consistent with ICANN’s Bylaws, the IRP Panel is to issue a written “declaration,” rather than some sort of arbitration award, designating, among other things, the prevailing party.⁸¹ The Board will give serious consideration to the IRP Panel’s declaration and, “where feasible,” shall consider the IRP Panel’s declaration at the Board’s next meeting.⁸²

ARGUMENT

39. The GCC’s IRP Request fails for three, independent reasons. First, the GCC’s request is time barred—the deadline for the GCC to file its IRP request expired over a year ago when the NGPC publicly stated that it would proceed with the .PERSIANGULF application.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Absent a governing provision in ICANN’s Bylaws or the ICDR’s Supplemental Procedures, the ICDR Rules apply. In the event of any inconsistency between the Supplementary Procedures and the ICDR’s Rules, the Supplementary Procedures shall govern. *Id.*, Art. IV, § 3.8; *see also* ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers, Independent Review Process (“Supplementary Procedures”), § 2 (Ex. R-19), *also available at* <https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf>.

⁷⁹ Bylaws, Art. IV, § 3.12 (Ex. R-1).

⁸⁰ *Id.*, Art. IV, § 3.12; Supplementary Procedures ¶ 10 (Ex. R-19).

⁸¹ Bylaws, Art. IV, § 3.18 (Ex. R-1).

⁸² *Id.*, Art. IV, § 3.21.

Second, the GCC has not identified a single ICANN Board action that violated ICANN's Articles and Bylaws. Third, the GCC has not been "materially affected" by the NGPC's decision to proceed with the .PERSIANGULF Application because it has not suffered a cognizable injury.

I. THE GCC'S REQUEST IS TIME BARRED.

40. As is clearly set forth in ICANN's Bylaws and documented procedures, an IRP must be initiated within thirty days of the posting of the Board meeting minutes that the IRP claimant contends demonstrate that ICANN violated its Bylaws or Articles of Incorporation, unless extended by a CEP or a written agreement between the claimant and ICANN.⁸³

41. The only ICANN Board action that even arguably could have injured the GCC was the NGPC's decision to direct ICANN staff to continue processing the .PERSIANGULF Application after the GAC advised that it did not object to the Application proceeding. That decision was set forth in the NGPC's Durban Communiqué Scorecard, which was approved by the NGPC on 10 September 2013 and publicly posted on 12 September 2013.⁸⁴ The minutes and Board Briefing Materials related to that decision were posted on 30 September 2013.⁸⁵ Thus, the GCC's deadline to file its IRP Request expired on 30 October 2013, *nearly 14 months ago*. As such, this IRP Request is now time barred.

42. In support of its Emergency Request, the GCC submitted a witness declaration from Abdulrahman Al Marzouqi, who represents the United Arab Emirates ("UAE") on the GAC and in the UAE's dealings with ICANN.⁸⁶ Mr. Al Marzouqi states that he engaged in discussions with ICANN about the .PERSIANGULF Application after the NGPC action in

⁸³ See ¶¶ 21-22, above.

⁸⁴ NGPC Resolution 2013.09.10NG03 (Ex. R-17); Annex 1 to NGPC Resolution 2013.09.10NG03 (Ex. R-18).

⁸⁵ Minutes of 10 September 2013 Meeting of the NGPC (Ex. R-20), *also available at* <https://www.icann.org/resources/board-material/minutes-new-gtld-2013-09-10-en>.

⁸⁶ Witness Statement of Abdulrahman Al Marzouqi in Support of GCC's Emergency Request (Ex. R-23).

September 2013. Mr. Al Marzouqi's witness statement, however, does not show that the running of the IRP's 30-day timeline was tolled or stayed by these informal discussions. First, there is no claim that the GCC or Mr. Al Marzouqi invoked the CEP, because they did not. Second, there is no claim that Mr. Al Marzouqi sought an extension in the time to file an IRP Request, because he did not. Third, there is no claim or evidence that ICANN representatives told Mr. Al Marzouqi that the 30-day deadline for filing an IRP Request was extended, because they did not.

43. The GCC knew or should have known about ICANN's documented procedures governing the timing of requests for IRP and CEP. Those procedures, as set forth in the Bylaws and the Supplementary Procedures, are publicly available and were last amended in April 2013. ICANN was under no duty to affirmatively inform the GCC, or Mr. Al Marzouqi, of the timing for filing an IRP Request, as Mr. Al Marzouqi's witness statement seems to imply.

44. The GCC also seems to argue that the 30-day deadline was tolled because the informal resolution discussions between Mr. Al Marzouqi and ICANN were equivalent to a CEP. The CEP, however, is a formal resolution process that is invoked by the sending of an email to a particular ICANN address with specific information, and is distinct from the informal discussions that Mr. Al Marzouqi describes and that ICANN routinely engages in.⁸⁷ Moreover, ICANN's documented procedures make clear that any modification of the timing of an IRP or CEP must be in writing.⁸⁸ The GCC never invoked the CEP or formally sought any sort of extension in the GCC's time to file its IRP Request.

45. By asserting that the GCC's IRP Request is time barred, ICANN is not seeking to evade its own accountability mechanisms or this IRP. Rather, ICANN is seeking to ensure that all IRP claimants are treated in the same manner and in a manner that is consistent with

⁸⁷ Bylaws, Art. IV, § 3.14.

⁸⁸ Cooperative Engagement Process – Request for Independent Review (Ex. R-5).

ICANN’s documented procedures. Indeed, the GCC’s late IRP Request affects the rights of third parties, including the applicant for the .PERSIANGULF gTLD, and ICANN, which has established procedures for all applicants and third parties when it comes to objecting to new gTLD applications. The GCC simply failed to follow these procedures.

II. THE GCC FAILS TO IDENTIFY ANY ICANN BOARD ACTION THAT VIOLATED ICANN’S ARTICLES OR BYLAWS.

46. Even if the GCC’s IRP Request were not time barred, the GCC has not stated any basis for independent review because the GCC fails to identify any Board action or decision that violated ICANN’s Articles or Bylaws.⁸⁹ Instead, the GCC claims that ICANN violated its “guidelines” by: (i) failing to respect the GCC’s concern regarding the .PERSIANGULF Application; (ii) failing to properly consider the GAC’s advice; and (iii) failing to require that the .PERSIANGULF Application obtain support from “relevant governments.”⁹⁰ The GCC further claims that ICANN improperly treated the .PERSIANGULF Application differently than the applications for .ISLAM and .HALAL,⁹¹ and that Judge Schwebel incorrectly decided the GCC’s Community Objection.⁹² None of these claims demonstrates a violation of the Articles or Bylaws by ICANN’s Board, or supports the GCC’s IRP Request.

A. The NGPC Adhered To The Guidebook And Violated No Article Or Bylaws Provision In Allowing The .PERSIANGULF Application To Proceed.

47. The GCC’s general claims that ICANN did not respect the GCC’s concern about the Application and failed to properly consider the GAC’s advice are incorrect. As detailed above, ICANN properly processed the Early Warning prompted by the GCC as well as the GCC’s Community Objection.

⁸⁹ Bylaws, Art. IV., § 3.2 (Ex. R-1).

⁹⁰ IRP Request, ¶¶ 55-58.

⁹¹ *Id.*, ¶¶ 60-69.

⁹² *Id.*, ¶¶ 70-74.

48. Moreover, ICANN’s Board (through the NGPC) properly considered the GAC’s advice regarding the .PERSIANGULF gTLD. In its Beijing Communiqué, the GAC initially advised the NGPC not to proceed beyond initial evaluation of the .PERSIANGULF Application so that the GAC would have additional time to consider the GCC’s concerns.⁹³ The NGPC did just that, stating that “ICANN will allow evaluation and dispute resolution processes to go forward, but will not enter into registry agreements with applicants for the identified strings for now.”⁹⁴ Subsequently, in its Durban Communiqué, the GAC advised ICANN that the GAC had completed its consideration of .PERSIANGULF and “d[id] not object” to the Application proceeding.⁹⁵ Again, the NGPC accepted that advice, stating that ICANN would continue to process that Application in accordance with the procedures in the Guidebook.⁹⁶ Even at this step, however, the NGPC noted that the GCC’s Community Objection was still pending, and allowed that process to resolve before taking any definitive action on .PERSIANGULF.⁹⁷

49. ICANN’s Board took all the steps required of it when presented with the GCC’s concerns about, as well as the GAC’s advice regarding, the .PERSIANGULF Application, and the GCC has presented no evidence to the contrary.

50. Likewise, the GCC’s argument that ICANN acted inconsistently with the GAC Principles Regarding New gTLDs (“GAC Principles”) by permitting the .PERSIANGULF Application to proceed without the support of “relevant governments” is misplaced.⁹⁸ As an initial matter, the GAC Principles are not part of ICANN’s Articles or Bylaws, which are the

⁹³ Beijing Communiqué ¶ IV.1.c (Ex. R-13).

⁹⁴ Annex 1 to NGPC Resolution 2013.06.04.NG01 at GAC Register #1-2 (Ex. R-15), *also available at* <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-04jun13-en.pdf>.

⁹⁵ Durban Communiqué (CI’s Annex 24).

⁹⁶ Annex 1 to NGPC Resolution 2013.09.10.NG03 at GAC Register #9 (R-18), *also available at* <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-10sep13-en.pdf>.

⁹⁷ *Id.*

⁹⁸ IRP Request, ¶ 57.

only documents relevant to this IRP. The GAC Principles were presented to ICANN in March 2007 in order to inform the development of the New gTLD Program and eventually the Guidebook.⁹⁹ The GAC’s statement in the GAC Principles that “ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant government or public authorities,”¹⁰⁰ informed the drafting of Section 2.2.1.4 of the Guidebook regarding “geographic names.”¹⁰¹ That section of the Guidebook specifies that in accordance with the GAC Principles, applications for countries or territories listed in the ISO 3166-1 standard will not be approved.¹⁰² It further specifies that applications for certain geographic names, defined to include certain city names, certain sub-national place names listed in the ISO 3166-2 standard, and names listed as a UNESCO region or appearing on the “Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings” list, must obtain support of the “relevant governments.”¹⁰³ However, applications that do not fit within the Guidebook’s definition of “geographic names requiring government support” “will not require documentation of government support in the evaluation process.”¹⁰⁴ “Persian Gulf” is not a designated “geographic name” as that phrase is defined in the Guidebook, and therefore did not (and does not) require the support of relevant governments.

⁹⁹ GAC Principles Regarding New gTLDs, ¶ 1.1 (Ex. R-21).

¹⁰⁰ *Id.*, ¶ 2.2.

¹⁰¹ Guidebook, § 2.2.1.4 (Ex. R-2).

¹⁰² *Id.*, § 2.2.1.4.1.

¹⁰³ *Id.*, § 2.2.1.4.2.

¹⁰⁴ *Id.* ICANN’s Geographic Names Panel is one of multiple panels that are involved in ICANN’s initial evaluation process for new gTLDs. The Geographic Names Panel is responsible for determining if a proposed new gTLD represents a “geographic name” (country or territory name, sub-national geographic name, city name, continent or UN Region) under the standards set forth by Guidebook. The Geographic Names Panel also evaluates whether geographic name applications require government support and, if so, ensures that the supporting documents from government authorities included in the application are verified and original. *See* Guidebook, § 2.2.1.4.2.

51. Accordingly, there is no support for the claims that ICANN did not consider the GCC's concerns, did not properly implement the GAC's advice, or failed to require government support for the .PERSIANGULF gTLD. The GCC expressed its concerns about the Application through the two appropriate vehicles, the GAC and the Community Objection process. In response, ICANN did precisely what it was supposed to do pursuant to the Guidebook—it considered and followed the GAC's advice, and it waited for and respected the expert determination on the GCC's Community Objection to the Application. There is no Article, Bylaws provision or "guideline" that requires the ICANN Board to do anything more than follow the processes that it has followed.

B. The NGPC Properly Treated The .PERSIANGULF Application Differently Than The .ISLAM And .HALAL Applications.

52. Similarly, there is no merit to the GCC's claim that the ICANN Board improperly treated the .PERSIANGULF Application differently than the applications for .ISLAM and .HALAL.¹⁰⁵ In fact, the NGPC *did* treat these applications differently, but it did so because these applications were the subject of *different types of advice* from the GAC, which required different treatment. As set forth above, the GAC's Beijing Communiqué provided "non-consensus" advice to ICANN, pursuant to Section 3.1 of the Guidebook, that .ISLAM and .HALAL should not proceed.¹⁰⁶ Pursuant to the Guidebook, "non-consensus" advice from the GAC regarding an application means that the "ICANN Board is expected to enter into dialogue with the GAC to understand the scope of the concerns."¹⁰⁷ Following receipt of such advice, ICANN's Board (through the NGPC) required the applicant for .ISLAM and .HALAL to

¹⁰⁵ IRP Request ¶¶ 60-69.

¹⁰⁶ Beijing Communiqué ¶ IV.1.a.ii (Ex. R-13).

¹⁰⁷ Guidebook, § 3.1 (II).

engage with relevant parties in an effort to address the concerns stated in the GAC advice.¹⁰⁸

53. On the other hand, with respect to the .PERSIANGULF Application, the GAC (after extended consideration) specifically advised that it “does not object” to the Application going forward.¹⁰⁹ Accordingly, the .PERSIANGULF Application has proceeded, while .ISLAM and .HALAL have not. The applications were treated differently because the GAC viewed them differently and provided significantly different advice with respect to each.

C. **The GCC’S Argument That The Expert Panelist Incorrectly Overruled Its Community Objection Is Not An Appropriate Basis For An IRP.**

54. Finally, the issues that the GCC raises regarding Judge Schwebel’s determination on the GCC’s Community Objection are not a proper basis for an IRP.¹¹⁰ A determination by an Expert Panelist in connection with the Objection and Dispute Resolution Process is not a **Board** action; it is an action of an independent expert selected and appointed by an independent dispute resolution provider (in this case the ICC) and therefore not subject to an IRP challenge.¹¹¹ Moreover, there is nothing in the Articles, Bylaws or Guidebook that requires, or permits, ICANN’s Board to substantively review the determinations of an Expert Panelist.¹¹² The GCC may disagree with the expert determination, but that disagreement does not support an IRP.

III. THE GCC HAS NOT BEEN NEGATIVELY AND “MATERIALLY AFFECTED” BY THE NGPC’S DECISION TO PROCEED WITH THE APPLICATION.

55. An IRP is only available to those negatively and “materially affected” by an ICANN Board action or decision.¹¹³ Other than a conclusory statement that a .PERSIANGULF gTLD “will promote Iranian beliefs . . . and falsely create the perception that the Arab nations

¹⁰⁸ 7 February 2014 Letter from S. Crocker to M. Abbasnia (Ex. R-22).

¹⁰⁹ Durban Communiqué, ¶ IV.1.3 (CI’s Annex 24).

¹¹⁰ IRP Request, ¶¶ 70-74.

¹¹¹ Guidebook, § 3.2.3 (Ex. R-2); Bylaws, Art. IV, § 3.2 (Ex. R-1).

¹¹² Guidebook, § 3.4.6 (Ex. R-2).

¹¹³ Bylaws, Art. IV, § 3.2 (Ex. R-1).

that reside in the Gulf accept the disputed name,” the GCC fails to describe any legally-recognizable harm or injury it will suffer if a .PERSIANGULF gTLD is created.¹¹⁴ As previously determined by both the IO and Judge Schwebel, there is a real question about whether the GCC will suffer any legally-recognizable harm at all if the .PERSIANGULF gTLD is approved. Moreover, as Judge Schwebel recognized in his expert determination on the GCC’s Community Objection, any misperception that Arab states in the region accept the disputed name could be counteracted by the “registration of a domain such as .ARABIANGULF gTLD.”¹¹⁵

56. Although the GCC clearly has strong convictions regarding the .PERSIANGULF Application, there is simply no indication that creation of a .PERSIANGULF gTLD will cause the GCC any material detriment or legally-recognized injury. In other words, the GCC has not been negatively and materially affected by the ICANN Board’s decision to proceed with the .PERSIANGULF Application.

IV. ICANN’S RESPONSE TO THE REQUESTED RELIEF.

57. The GCC’s IRP Request should be denied in its entirety, including its request for relief. The GCC asks that this IRP Panel issue a declaration “requiring ICANN to refrain from signing the registry agreement with Asia Green, or any other entity.”¹¹⁶ An IRP Panel, however, is limited to stating its opinion by “declar[ing] whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and recommending that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel.¹¹⁷ Even if there were a basis for some kind of relief here (which there is not), neither this nor any IRP panel has the authority to award affirmative relief.

¹¹⁴ IRP Request, ¶ 58.

¹¹⁵ Expert Determination in ICC Case No. EXP/423/ICANN/40, ¶ 42.

¹¹⁶ IRP Request, ¶ 75.

¹¹⁷ Bylaws, Art. IV, § 3.11 (Ex. R-1).

58. The GCC also requests that this IRP Panel award the GCC “its costs in this proceeding, including, without limitation, all legal fees and expenses.”¹¹⁸ However, ICANN’s Bylaws specifically provide that “each party to the IRP proceeding shall bear its own expenses.”¹¹⁹ On the other hand, the Bylaws do provide that where, as here, a claimant fails to engage in a CEP prior to filing its IRP Request, “the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees,” if ICANN prevails.¹²⁰

CONCLUSION

59. The ICANN Board’s conduct with respect to the .PERSIANGULF Application was consistent with ICANN’s Articles and Bylaws. ICANN allowed the GCC’s concerns and Community Objection to work their way through the processes set out in the Guidebook, and ICANN’s Board (through the NGPC) properly considered the GAC’s advice on these issues. Not only has the GCC failed to demonstrate that ICANN’s Board violated the Articles and Bylaws, its IRP was submitted more than a year after the deadline to do so and does not identify any legally-recognized injury to the GCC if the .PERSIANGULF Application proceeds. Accordingly, the GCC’s IRP Request should be denied.

Respectfully submitted,

JONES DAY

By: Eric P. Enson / RHZ
Eric P. Enson

Dated: January 20, 2015

Counsel for Respondent ICANN

¹¹⁸ IRP Request, ¶ 75.

¹¹⁹ Bylaws, Art. IV, § 3.18 (Ex. R-1).

¹²⁰ *Id.*, Art. IV, § 3.16.